Tai Choi Yu v Government of Malaysia & Ors

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NO 01-17-93
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
15 FEBRUARY 1994

Revenue Law *— Income tax — Power of Director General to issue certificate under s 104 of the Income Tax Act 1967 to prevent taxpayer from leaving Malaysia until tax settled — Whether Director General of Inland Revenue bound to hear taxpayer before issuing certificate — Income Tax Act 1967 s 104*

Revenue Law *— Income tax — Power of Director General to issue certificate under s 104 of the Income Tax Act 1967 to prevent taxpayer from leaving Malaysia until tax settled — Notice of issue of certificate served on taxpayer three years after certificate issued — Whether certificate was null and void because of delay — Income Tax Act 1967 ss 104(5) & 115*

Revenue Law *— Income tax — Power of Director General to issue certificate under s 104 of the Income Tax Act 1967 to prevent taxpayer from leaving Malaysia until tax settled — Whether certificate under s 104(1) could only be issued where taxpayer was about to leave Malaysia permanently — Income Tax Act 1967 s 104*

Words and Phrases *— 'Convenient speed' — Interpretation Acts 1948 and 1967 s 54(2)*

The appellant owed the Inland Revenue Department the sum of RM239,332.64 in income taxes. On 27 June 1988, the Director General of Inland Revenue ('the DGIR') issued a certificate under s 104(1) of the Income Tax Act 1967 ('the Act') to the Director of Immigration requesting the latter to take action to prevent the appellant from leaving Malaysia until he had settled the tax. The certificate was not enforced immediately as the appellant was allowed to travel overseas until 20 April 1990. On that date, the appellant applied for the renewal of his passport and was informed of the certificate issued by the DGIR.

On 23 April 1991, the appellant commenced an action in the High Court at Miri for a declaration that the certificate issued by the DGIR to the Director of Immigration was null and void as it was made contrary to s 104 of the Act, mala fide and against established principles of natural justice. The appellant argued that the words 'leaving Malaysia' in s 104(1) of the Act must be interpreted to mean leaving Malaysia permanently. The application was dismissed in the High Court and the appellant appealed. The main issue in this appeal was whether the certificate issued by the DGIR under s 104(1) of the Act was valid because: (i) the DGIR did not give the appellant the right to be heard before making a decision to issue the certificate; and (ii) the notice of the issue of the certificate was only served on the appellant on 16 May 1991.

Held, dismissing the appeal:

(1) The words 'leaving Malaysia' used in s 104(1) of the Act are plain and clear and it was not appropriate to read the word 'permanently' into the section. The evidence showed that between June 1988 and April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances, the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax.

(2) The DGIR was not required to give notice and hear the appellant under s 104(1) of the Act before making his decision to issue the certificate. If a notice to show cause was issued to the appellant, it would only serve as a warning of the action to be taken against him and afford him the opportunity to leave the country before the certificate can be issued.

(3) The delay in the service of notice was not fatal so as to render the certificate null and void. To hold otherwise could only defeat the object and purpose of s 104 of the Act and create inconvenience in the implementation of the section. As the certificate was lawfully issued by the DGIR, the appellant's application failed under s 104(5) of the Act.

(4) 'Convenient speed' means reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case.

[Bahasa Malaysia summary

Perayu berhutang sebanyak RM239,332.64 kepada Jabatan Hasil Dalam Negeri sebagai cukai pendapatan. Pada 27 Jun 1988, Pengarah Hasil Dalam Negeri ('PHDN') telah mengeluarkan suatu sijil di bawah s 104(1) Akta Cukai Pendapatan 1967 ('Akta itu') kepada Pengarah Imigresen meminta supaya beliau mengambil langkah untuk menghalang perayu daripada meninggalkan Malaysia sehingga perayu membayar cukainya. Sijil itu tidak dikuatkuasakan dengan segera kerana perayu telah dibenarkan mengunjung ke luar negeri sehingga 20 April 1990. Pada tarikh itu, perayu telah memohon untuk memperbaharui pasportnya dan beliau telah diberitahu mengenai sijil yang telah dikeluarkan oleh PHDN.

Pada 23 April 1991, perayu telah memulakan suatu tindakan di Mahkamah Tinggi Miri untuk suatu deklarasi bahawa sijil yang telah dikeluarkan oleh PHDN kepada Pengarah Imigresen batal dan tidak sah kerana ia dibuat bertentangan dengan s 104 Akta itu, mala fide dan tidak mengikut prinsip keadilan asasi yang mantap. Perayu berhujah bahawa perkataan 'meninggalkan Malaysia' di dalam s 104(1) Akta itu mesti ditafsirkan supaya bermakna meninggalkan Malaysia untuk selama-lamanya. Permohonan itu telah ditolak oleh Mahkamah Tinggi dan perayu telah membuat rayuan. Isu utama di dalam rayuan ini adalah sama ada sijil yang telah dikeluarkan oleh PHDN di bawah s 104(1) Akta itu sah kerana: (i) PHDN tidak memberi perayu peluang

untuk didengar sebelum membuat keputusan untuk mengeluarkan sijil itu; dan (ii) notis tentang pengeluaran sijil itu hanya disampaikan atas perayu pada 16 May 1991.

Diputuskan, menolak rayuan itu:

(1) Perkataan 'meninggalkan Malaysia' yang digunakan di dalam s 104(1) Akta itu adalah jelas dan nyata dan tidak sesuai untuk membaca perkataan 'selama-lamanya' ke dalam seksyen itu. Keterangan menunjukkan bahawa di antara Jun 1988 dan April 1990, perayu sering mengunjung ke luar negara dan telah tinggal lebih lama di negara asing daripada di Malaysia. Dalam keadaan ini, PHDN mempunyai justifikasi apabila beliau berpendapat bahawa perayu akan meninggalkan negara ini tanpa membayar cukainya.

(2) PHDN tidak dikehendaki memberi notis dan mendengar perayu di bawah s 104(1) Akta itu sebelum membuat keputusannya untuk mengeluarkan sijil itu. Jika suatu notis untuk menunjukkan kausa dikeluarkan kepada perayu, ia hanya akan memberi suatu amaran tentang tindakan yang akan diambil terhadapnya dan memberi peluang kepadanya untuk meninggalkan negara ini sebelum sijil itu boleh dikeluarkan.

(3) Kelengahan menyampaikan notis itu tidak menjadikan sijil itu batal dan tidak sah. Keputusan sebaliknya akan hanya mengecewakan objektif dan tujuan s 104 Akta itu dan mewujudkan kesulitan dalam pelaksanaan seksyen itu. Oleh kerana sijil itu telah dikeluarkan secara sah oleh PHDN, permohonan perayu gagal di bawah s 104(5) Akta itu.

(4) 'Kecepatan yang sesuai' bermakna masa yang munasabah dalam mana sesuatu tindakan mesti dilakukan, dengan mempertimbangkan fakta dan keadaan tertentu setiap kes.]

Case referred to

1 *S Kulasingam & Anor v Commissioner of Lands Federal Territory & Ors* [1982] 1 MLJ 204 (refd)

Legislation referred to

Income Tax Act 1967 ss 104, 115
Interpretation Acts 1948 and 1967 s 54(2)

Appeal from: Originating Summons No MR17 of 1991 (High Court, Miri)

Appellant in person.

Abd Karim bin Jalil (*Noorbahri bin Baharuddin* with him) (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Eusoff Chin SCJ (delivering the judgment of the court): The High Court at Miri had under s 106 of the Income Tax Act 1967 (hereinafter 'the Act') adjudged a sum of RM231,016.95 as income tax due and payable by the appellant to the Director General of Inland Revenue, the second respondent (hereinafter 'the DGIR'). Subsequently, additional assessment was computed making the total tax due and payable to be RM246,482.39. The appellant made a few payments, leaving a sum of RM239,332.64 as still outstanding.

The DGIR, on 27 June 1988, issued a certificate under s 104(1) of the Act to the Director of Immigration requesting the latter to take action to prevent the respondent from leaving Malaysia until he had settled the tax. The certificate was not enforced immediately because the respondent was allowed to travel overseas until 20 April 1990.

The appellant had a valid passport which was due to expire on 9 September 1990. Because he often travelled out of Malaysia the pages in his passport had been fully used up. On 20 April 1990, he applied for the renewal of his passport. On 22 April 1990, upon inquiry made by the appellant on the position of the renewal of his passport, he was told by an immigration officer at Miri that the DGIR had issued a certificate under s 104(1) of the Act, whereupon the appellant began negotiating with officers of the DGIR on the settlement of the unpaid tax. On 29 August 1990, the appellant agreed to pay RM5,000 per month towards the outstanding tax provided that he was issued a new passport. The DGIR informed the appellant that the certificate would be revoked only if the appellant furnished security under s 104(4)(a) of the Act in the form of a bank guarantee for the amount of tax still outstanding. The revocation of the certificate would remove the obstacle so as to enable the Immigration Department to consider and issue to the appellant a new passport. No evidence was adduced to confirm that the appellant had furnished the required bank guarantee.

It was seven months later, ie on 23 April 1991, that the appellant commenced an action in the High Court at Miri for a declaration that the certificate issued by the DGIR to the Director of Immigration dated 27 January 1988 was null and void as it was made contrary to s 104 of the Act, mala fide and against established principles of natural justice; and consequently the Director of Immigration should not have acted on the certificate.

On 6 March 1993, the High Court at Miri dismissed the appellant's application with costs. Hence this appeal.

Before us, the main issue is whether the certificate issued by the DGIR on 27 June 1988 to the Director of Immigration under s 104(1) of the Act was valid because the DGIR did not give the appellant the right to be heard, before making a decision to issue the certificate, and had served a notice of the issue of the certificate to the appellant very late, on 16 May 1991. For convenience, we quote the relevant provisions of s 104:

> Recovery from persons leaving Malaysia.
>
> (1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying —

A (a) all tax payable by him (whether or not due or due and payable);
(b) all sums payable by him under section 103(4), (5) or (5A); and
(c) all debts payable by him under section 107A(2) or 109(2) or 109B(2),

may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable *with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums* and debts so payable *or furnishes security to the satisfaction of the Director General for their payment.*

B (2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use
C of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:
D Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subsection (1) —

E (a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or
(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer,

F the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia. (Emphasis added.)

We also quote the contents of the certificate issued by the DGIR to the Director of Immigration:

G Sijil cukai terhutang
(Certificate of tax in default)
di bawah s 104 Akta Cukai Pendapatan 1967
(under s 104 of the Income Tax Act 1967)

Nama: Tai Choi Yu
No kad pengenalan: K641851
Tarikh lahir: 13 Februari 1947

H Saya sahkan di sini bahawa pembayar cukai yang bernama di atas masih lagi berhutang kepada Jabatan ini sebanyak RM239,332.64 (Ringgit: Dua ratus tiga puluh sembilan ribu tiga ratus tiga puluh dua dan sen enam puluh empat sahaja) bagi cukai tahun taksiran 1979 (Tambahan), 1981 (Tambahan), 1982, 1983, 1984 (Tambahan), 1986 dan 1987.

I Pada pendapat saya bahawa penama di atas akan atau berkemungkinan meninggalkan Malaysia tanpa membayar cukai tersebut.

Menurut s 104 Akta Cukai Pendapatan 1967, saya memohon pihak tuan untuk mengambil langkah-langkah yang perlu untuk menghalang Encik Tai

Choi Yu daripada meninggalkan Malaysia sehingga cukai yang terhutang itu diselesaikan atau memberi satu jaminan yang boleh memuaskan pihak saya bagi menyelesaikan cukai tersebut. A

'Berkhidmat untuk negara'
'Cintailah bahasa kita'

Saya yang menurut perintah B
—tt—
(Chew Cheng Tuan)
Pengarah Hasil Dalam Negeri
Sarawak.

One of the primary functions of the DGIR under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorized in Pt VII (ss 103–111) of the Act. Action under s 104 is one of the authorized modes. It is the requirement of s 103 of the Act that a person pays his assessed tax on the service of the notice of assessment on him failing which the DGIR may, besides using all other authorized modes, proceed to recover in court the assessed tax as a debt due to the Government, and if judgment is obtained, to execute the judgment. C D

Under s 104(1) of the Act, the DGIR, if he is of the opinion that a person is about or likely to leave Malaysia without paying all tax payable by the person, is authorized to issue a certificate requesting the Director of Immigration to prevent the person from leaving Malaysia. E

The appellant submitted that the words 'leaving Malaysia' in s 104(1) of the Act must be interpreted to mean leaving Malaysia permanently. We find that the words used in this section are plain and clear, and we do not think it appropriate to read the word 'permanently' into this section. We are of the view that if that were the intention of Parliament, such words as 'permanently' or 'with no intention of returning' would have been inserted after the words 'leave Malaysia' in this section. But was there justification in the DGIR forming the opinion that the appellant was about or likely to leave Malaysia? The DGIR cannot read the mind of the appellant, and neither would the appellant tell the DGIR if he intends to leave Malaysia without settling his tax. The DGIR would have to base his opinion on information and reports received by him, and on knowledge gathered or acquired in the course of dealing with the appellant's tax affairs. The evidence in the appeal record shows that between June 1988 and April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances, we find that the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax. F G H

The appellant submitted that the DGIR acted against the rule of natural justice. In other words, the appellant had not been given a notice to show cause why the DGIR should not issue the certificate. That, we feel is not the intention of the law because it would defeat the object and purpose of the certificate. If a notice to show cause was issued to the appellant, it would only serve as a warning of the action about to be taken against him, and this I

would afford him the opportunity to leave the country before the certificate can be issued.

In *S Kulasingam & Anor v Commissioner of Lands Federal Territory & Ors*,[1] the Federal Court, hearing a land acquisition appeal, held that since the Land Acquisition Act 1960 imposed no obligation on the acquiring authority to afford the land owner the opportunity to be heard before making a decision to acquire the land, the owner could not claim the right to be heard under the rules of natural justice. Here too, the DGIR is not required by s 104(1) to hear the appellant before making his decision.

We are, therefore, of the view that the DGIR is not bound to give notice and hear the appellant before issuing the certificate.

The last ground raised in the argument before us is whether the DGIR must send the appellant the notice of the issue of the certificate under s 104(3) of the Act at the time of or soon after the DGIR issues the certificate to the Director of Immigration. We note that although the certificate was issued on 27 June 1988, the notice of the issue of the certificate was given to the appellant only on 16 May 1991. The Director of Immigration had also not taken immediate action on the certificate to stop the appellant from travelling overseas until 22 April 1990. But the fact remains that the appellant knew of the existence of the certificate on 22 April 1990 when he encountered difficulty in renewing his passport.

Section 104(3) of the Act does not impose any time limit within which the DGIR must notify the appellant that a certificate had been issued under s 104(1) of the Act. That being so, generally the provision of s 54(2) of the Interpretation Acts 1948 and 1967 (Consolidated and revised, 1989) would apply. This section states, 'Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.'

What is 'convenient speed' has been held by the courts to mean reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case.

We have earlier stated that the object of s 104(1) of the Act is to prevent the tax payer from leaving the country without paying his outstanding tax. It would be futile if the DGIR were to send to the appellant the notice of the issuance of the certificate unless the DGIR had information that the Director of Immigration had taken the necessary action on the certificate. Here the DGIR was aware that the Director of Immigration had not taken any action on the certificate because the appellant was allowed to leave on overseas travels until 22 April 1990. On this date too, the appellant was told by an immigration officer of the existence of the DGIR's certificate. Once the appellant knew of the existence of the certificate, the provision of s 115 of the Act would apply to him. This section states:

> (1) Any person who, knowing that a certificate has been issued in respect of him under section 104, voluntarily leaves or attempts to leave Malaysia without paying all the tax, sums and debts specified in the certificate or furnishing security to the satisfaction of the Director General for the payment thereof shall be guilty of an offence and shall, on conviction, be liable to a fine not

exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

(2) A police officer or immigration officer may arrest without warrant any person whom he reasonably suspects to be committing or about to commit an offence under this section.

For the reasons stated, we are of the view that the delay in the service of the notice on the appellant of the notice under s 104(3) of the Act was not fatal so as to render the certificate null and void. To hold otherwise would only defeat the object and purpose of s 104, and create great inconvenience in the implementation of this section.

Section 104(5) of the Act states:

> No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or section 115(2).

Since we find that the certificate had been lawfully issued by the DGIR, the appellant's application must fail under s 104(5) of the Act.

We dismiss this appeal with costs to the respondent. We also order that the deposit of RM500 be paid to the respondents to account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim